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ABSTRACT

Issues in students' First Amendment rights are discussed in this paper, which is directed toward school board members. The "Tinker v. Des Moines Independent Schools" (1969) decision is discussed, in which the United States Supreme Court struck down the discipline imposed on students who wore black armbands during school hours to protest the Vietnam War. A second court decision, "Hazelwood School v. Kuhlmeier" (1988), addresses the issue of principal censorship of school-sponsored newspapers. Finally, "Board of Education v. Pico" (1982) is discussed, which addresses school board discretion to remove objectionable books from school libraries. (LMI)

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WISCONSIN SCHOOL BOARD ASSOCIATION
STUDENT FIRST AMENDMENT RIGHTS
January 22, 1991

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The educational function is central to your concern with law. School Boards, like school administrators and teachers, are at the heart of the educational process, and board policies and actions are highly visible, much discussed, and measured by the Fourteenth and First Amendments. Unfortunately, your observers, students, parents, and the media often have an inflated and inaccurate notion of what the First Amendment means in the K-12 arena.

This means that regardless of your legal right to regulate, a lot of people including those who buy printers ink by the barrel, are likely to attack you, and sue you. It's easy to sue, and it's far easier to be a defendant than a plaintiff, but it's costly to defend law suits, even when you win. It makes sense, therefore, to test your actions by wisdom, not merely by law. What's lawful is not necessarily wise. (A few years ago the Supreme Court sustained a state law requiring K-12 teachers to be citizens; no aliens can teach at this level. Is such a sweeping law wise?)

One function of government is to educate and a high degree of toleration ought to be part of the message we convey. The legal basis for that toleration of diversity begins at least with *Meyer v. Nebraska*, 262 U.S. 390 (1923) where the Court struck down a Nebraska law forbidding teaching German to children before the 9th grade. At the same time the Court struck down an Oregon law forbidding parents from sending their children to parochial schools. Both these decisions upheld parental, not pupil, rights, and hence the question of child rights was not addressed.

Children of course are persons within the meaning of the 14th Amendment. They have constitutional rights as against government officials, you, but those rights are more qualified than the rights of college students, and others. Children are subject to nearly unreviewable academic rules - a comforting thought when I correct law exams.

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You, but not your observers, are likely to be comforted by the Supreme Court of the United States movement, beginning at least with *Regents of Michigan v. Ewing* (1986), toward greater respect for the exercise of academic judgment. More often than not the Courts sustain judgments found to be academic if based on a modicum of rationality.

Modern focus on the First Amendment rights of students begins with *Tinker v. Des Moines Independent School*, 393 U.S. 503 (1969), a remarkable decision striking down the discipline imposed on students who wore black armbands during school hours to protest the

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Vietnam war. Three teenagers determined to publicize their objections to the war by wearing black armbands. School officials became aware of the plan and adopted a policy that any student wearing an armband to school would be asked to remove it, and if not, to be suspended. The kids wore the armbands and were sent home.

Tinker was a hard case. The Court had previously upheld a national law forbidding one to burn ones draft card - the government interest in administering the draft trumped the card possessors interest in engaging in symbolic speech. Moreover, schools have traditionally exercised authority to keep order. However, the Court, with only two dissents, struck down the anti-armband rule. The *Tinker* opinions has several notable features.

1. The school rule was too narrow (some symbols were allowed);
2. Justice Fortas found no evidence of threatened disruption; (Justice Black saw some problems). The majority was explicit in pointing out that it wasn't ruling on the propriety of nondiscriminatory dress codes, and indeed implied that rules on skirt length and clothing in general might be upheld. The armbands were examples of "pure speech."
3. Justices Black and Fortas didn't like each other. Justice Black - a fervid defender of the First Amendment - dissented and stressed the importance of order and discipline.

QUESTIONS RAISED BY *TINKER*

Q. Would the school be sustained if they merely had required that armbands, and other symbols of dissent, be removed while attending class? i.e. you can wear them in the cafeteria, in halls, etc. The Court might have upheld such a law as a "time, place & manner" restriction. (Justice Fortas says that the school singled out a particular kind of protest about the Vietnam war.) But what if a school, foolishly, forbade students from wearing religious symbols, a cross, a replica of the Koran, or whatever? Here the Free Exercise Clause might apply, and the Court said, rather eloquently some years ago that children could not be forced to salute the flag, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

Q. What if many, rather than a few, students made hostile remarks to the children wearing armbands? What if the armband generated acts of violence, or there was reasonable belief that violence might be promoted? No facts were shown that the armbands were disruptive. A few years ago a lower federal court upheld the rule forbidding displaying the Confederate flag in a newly integrated public school.

Teacher Rights

Q. Would it be different if the school merely forbade teachers from wearing black armbands in the classroom? In 1972 a court held that school officials violated a high school teacher's constitutional rights when they discharged him because he'd worn a black armband in class to symbolize opposition to the Vietnam conflict, *James v. Board of Education*, 461

F.2d 566 (2nd Cir. 1972). The teacher didn't disrupt classroom activities, nor inspire any reaction, but what if he had?

Teacher rights present different problems, and the Supreme Court does not guide us as we might wish. A few years ago the Court divided 4 - 4 (Justice Powell not sitting) on the constitutionality of a state law forbidding teachers from advocating homosexuality, *Board of Education of Oklahoma City v. National Gay Task Force*, 470 U.S. 903 (1985).

A Return to School Discipline?

Justice Black would clearly be pleased with the current trend toward limiting *Tinker*, exemplified by *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986) where his views prevailed, although *Tinker* was merely distinguished and not overruled.

This decision upheld the imposition of school discipline on a senior who made a vulgar public speech, containing sexual innuendo supporting the election of another student for school office. The 9th Cir. citing *Tinker* forbade disciplining the student saying that allowing school officials to regulate speech by an "amorphous standard of indecency" would "increase the risk of cementing white, middle class standards for determining what is acceptable and proper speech and behavior in our public schools." The Supreme Court reversed. Chief Justice Burger engaged in balancing and upheld the discipline.

Justice Brennan agreed. Even if the speech was no more obscene or lewd than commonplace the speech could be punished because it was disruptive to the school environment. The District Court didn't think the speech was very disruptive, nor did Justice Thurgood Marshall.

What about school rules forbidding racial epithets? Would they be upheld under *Bethel* plus *Tinker* if we draft a rule that is neither vague, nor overbroad? We confront two contrasting doctrines: emotive speech has been protected in some settings, see *Cohen v. California*. But if the emotive speech threatens disruption I predict that it can be penalized although the threat of disruption ought to be clear and provable.

Recent cases reveal a trend toward greater respect for the judgment of government officials who regulate speech, or at least symbolic speech. Last year, for example, in *Barnes v. Glen Theatre* 111 S.Ct. 2456 (June 21, 1991) the Court, with no majority opinion, upheld an Indiana law forbidding nudity in a public place. Indiana forbade non-obscene nude barroom "Go-Go" dancing. As far as we know no viewer was offended, and all had notice of what the performance was to be.

The Court couldn't agree on a rationale for limiting First Amendment rights. Unlike the decision in *Bethel* the Court did not invite any balancing of interests. Chief Justice Rehnquist (joined by Justices O'Connor and Kennedy) found that while the statute hit expressive conduct that was within the protection of the First Amendment, the state could

lawfully promote societal order and morality. This was too sweeping a justification for Justice Souter to accept, so he invented a legislative purpose, to limit the secondary effects of nude bar dancing, preventing prostitution and exploitation of women. Nothing in the laws legislative history reveals that purpose. Four Justices, including the relatively conservative Justice White, found the Indiana law too sweeping. Indiana law did not apply to theatrical productions, or to nudity in private; it invited entirely too much administrative discretion.

If Rehnquist's position prevails it means that government can restrict speech in order to protect public morality - a pretty vague test. But the First Amendment still bites, and the Court has more recently rejected clearly the argument that reasonable restrictions on speech will be upheld, see *Simon & Schuster v. N.Y. State Crime Victims Board*, 60 U.S.L.W. 4029 (Dec. 10, 1991).

School Newspapers

You're doubtless familiar with *Hazelwood School v. Kuhlmeier*, 484 U.S. 260 (1988). Most, but not all national newspapers, deplored this 6 - 3 decision holding that a high school principal with responsibilities for a journalism class that published a school newspaper at public expense had authority to censor. The principal thought, perhaps erroneously, that an article on teen pregnancies and on the impact of divorces on children were inappropriate. Among his objections were that risk that some of the unnamed people mentioned might be identified. His concern for privacy was central.

The majority held, quite appropriately, that the school paper was not a public forum, i.e. a place open for broad discussion by nearly anyone, and concluded that the principal was justified in applying an educational standard. I note that the New York Times, which ordinarily interprets the First Amendment broadly, approved the decision, although it had some doubts about the specific editorial wisdom of the principal.

Hazelwood presents as many problems as it solves. Yes, secondary school-sponsored newspapers can be lawfully censored, but the decision does not in any way suggest that they should be sharply supervised. A school has an institutional role to fulfill, to protect the interests of the victims of a story, but also to assist in instilling the values which future generations ought to hold. Censorship, even if justified by the facts, is rightly viewed with suspicion. Do we really want school sponsored journals to be restricted to what is politically correct at the moment?

Does the *Hazelwood* doctrine go to far? What do you think of a recent decision? The 9th Circuit recently upheld the power of the school to exclude certain advertisements from the school newspaper, *Planned Parenthood of Southern Nevada Inc. v. Clark County School Dist.*, 941 F. 2d 817 (9th 1991) *en banc*.

Planned Parenthood sued claiming that the refusal of the schools to publish its advertisements in school newspapers, yearbooks and athletic programs violated the First.

The ads offered routine medical exams, birth control methods, pregnancy testing and pregnancy counseling and referral. The school district had authorized principals to establish ad guidelines & approve or reject ads.

The schools didn't want to lend the school's imprimatur to the controversial issue of birth control - they feared that the ads would violate the schools' statutory responsibility to provide sex education with approved materials & professional instructors.

The majority of the panel applied & extended *Hazelwood* - and emphasized that both involved editorial control over the contents of school-sponsored publications. The majority applied a public forum analysis inquiring whether the school intended to open ad space for public discourse, and concluded that it did not. Since it was not a public forum the only issue was whether the rules were reasonable. The real question, of course, is whether the "intent" test is required by *Hazelwood*.

Judge Norris dissented with 2 others, - since the purpose of the ad pages was to raise money, the schools had in fact accepted a wide array of advertisements it had created a limited public forum, and hence the school should not be now focusing on content. Hence strict scrutiny is required. He found the application of the rule flunked strict scrutiny. Judge Norris notes that specifically articulated, discriminatory content regulations might pass - ie. all ads are OK except those relating to birth control.

Harvard Law Review note is sharply critical, 105 Harvard L. Rev. 597 (1991).

> "*Clark* exploited the pliability of the education-specific, deferential rhetoric in *Hazelwood* and mistakenly gave license to unfettered government discretion to regulate school-related expression." 105 Harvard at 602. *Hazelwood* should only allow school regulation in a curricular forum. The "intent" test allows too broad a scope for government limitation on speech in nontraditional places.

It is important that the newspaper in *Hazelwood* was school sponsored. It might be quite different if the publication was unofficial, or at least not school sponsored. A graduate student at the University of Missouri was expelled for distributing an "underground" newspaper containing explicit vulgarity. The Supreme Court, without argument, found this unlawful under the First Amendment, with Chief Justice Burger, with Justices Rehnquist and Blackmun, dissenting, see *Papish v. Board of Curators*, 410 U.S. 667 (1973).

The Library Book Problem

In *Board of Education v. Pico*, 457 U.S. 853 (1982) a student (who had nearly finished law school when the case came out) challenged a school board's discretion to remove books from the school library. After receiving complaints about objectionable books the Board appointed a committee of parents & staff to review books for their educational suitability, good taste, and relevance & appropriateness. Of the nine books complained about

they recommended that two be removed, **The Naked Ape**, and **Down Those Mean Streets**. The Committee could not agree on **Soul on Ice**, and **A Hero Ain't Nothing But a Sandwich**. They said that **Slaughter House Five**, and **Black Boy** could be read with parental approval.

The case was difficult and seven opinions fail to supply a single answer.

1. Brennan, Marshall, Stevens & Blackmun agreed a trial necessary to determine whether the books were removed for valid, politically neutral reasons, or whether the removal was motivated by the Board's disagreement with the books contents.

2. Brennan, Marshall & Stevens, said students have a First Amendment right to have access to ideas within the school library.

3. White concurs that a trial is necessary, but doesn't want to say more.

Burger, Powell, Rehnquist & O'Connor dissent in separate opinions, but all assert that a school board does have discretion to determine what books should be in a library.

4. Burger asks "Who's in charge?" a federal judge & teen aged pupils?

5. Powell, former School Board President in Richmond was dismayed by the corrosion of School Board Power. He notes that the Board took its responsibilities seriously and tried to decide what values should be imparted - this is what they were elected to do, and what the majority finds unconstitutional. Powell appends a summary of excerpts from the books indicating some reason to believe the volumes were racist and/or vulgar.

6. Rehnquist - School board actions are part of many choices that must be made in the ordinary course of their duties, and the Court ought to ratify reasonable choices.

7. O'Connor. Does not agree with the Board, but they are entitled to deference.

Isn't the critical question in *Pico* who will control socialization of the young?" Should librarian employees have a right to select and retain books against the objections of the school board? Should student newspapers have a right to resist ad hoc intervention by administrators? In a primary school, secondary school, public university? What legal advice can you give to a school board or a public library when they draft a book purchasing program?